

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1921.

No. 3689.

808

OLIVER P. M. BROWN AND DETROIT DEPARTMENT
STORE, INC., A CORPORATION, APPELLANTS,

vs.

ABE GELLMAN AND AARON GELLMAN, SURVIVING
PARTNERS OF ABE GELLMAN; AARON GELLMAN AND
ABRAHAM KAMINSKY, TRADING AS GELLMAN AND
KAMINSKY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 5, 1921.

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Court of Appeals of the District of Columbia.

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KAMINSKY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3689.

OLIVER P. M. BROWN et al., Appellants,

vs.

ABE GELLMAN et al.

a Supreme Court of the District of Columbia.

At Law.

No. 64313.

ABE GELLMAN and AARON GELLMAN, Surviving Partners of
Abe Gellman, Aaron Gellman, and Abraham Kaminsky, Trading
as Gellman and Kaminsky, Plaintiffs,

vs.

OLIVER P. M. BROWN and DETROIT DEPARTMENT STORE, INC., a
Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed September 24, 1920.

In the Supreme Court of the District of Columbia.

At Law.

No. 64313.

ABE GELLMAN and AARON GELLMAN, Surviving Partners of
Abe Gellman, Aaron Gellman, and Abraham Kaminsky, Trad-
ing as Gellman and Kaminsky, Plaintiffs,

vs.

OLIVER P. M. BROWN and DETROIT DEPARTMENT STORE, INC., a
Corporation, Defendants.

Count No. 1.

The plaintiffs, Abe Gellmann and Aaron Gellman, surviving
partners of Abe Gellman, Aaron Gellman, and Abraham Kaminsky,

trading as Gellman and Kaminsky, sue the defendants, Oliver P. M. Brown, and Detroit Department Store, Incorporated, a corporation, for that heretofore, to wit, on June 1st, 1918, the said plaintiffs by deed signed by both the said defendants leased to the defendants premises located in Hopewell, Virginia, and more particularly described as lot 19 in Block 2 West City Point Sub-division in the County of Prince George, Virginia, to hold to the defendants from the 1st day of June, 1918, for three years at \$2,160.00 rent, payable monthly, that is to say \$60.00 in advance for said premises on the first day of each month, and the defendants thereby covenanted with the plaintiffs to pay them the said rent, as aforesaid, yet the rent for the months of December, 1918, January, 1919, February, 1919, March, 1919, April, 1919, May, 1919, June, 1919, July, 1919, August, 1919, September, 1919, October, 1919, November, 1919, December, 1919, January, 1920, February, 1920, March, 1920, April, 1920, May, 1920, June, 1920, July, 1920, August, 1920, is in arrear and unpaid. And the plaintiffs claim the sum of \$1,260.00 with lawful interest on the amounts as they became respectively due on the first of each month above set out, besides the costs of this suit.

Count No. 2.

The plaintiffs, Abe Gellman and Aaron Gellman, surviving partners of Abe Gellman, Aaron Gellman, and Abraham Kaminsky, trading as Gellman and Kaminsky, sue the defendants, Oliver P. M. Brown, and Detroit Department Store, Incorporated, a corporation, for that heretofore, to wit, on June 1st, 1918, the said plaintiffs rented to the defendants by an agreement signed by both the said defendants premises located in Hopewell, Virginia, and more particularly described as Lot 19 in Block #2, West City Point sub-division in the County of Prince George, Virginia, which the said defendants took as tenants of the plaintiffs from the 1st day of June, 1918, for the term of three years at \$2,160.00 for said term, payable monthly, that is to say in monthly installments of \$60.00 in advance on the first day of each month; and thereafter the plaintiffs at the request of the defendants on the 29th day of January, 1919, agreed to reduce the rent of said premises from the sum of Sixty Dollars per month to the sum of Forty Dollars per month, for an indefinite time; that the rent for the months of December, 1918, January, February, March, April, May, June, July, August, September, October, November, and December, 1919, and January, February, March, April, May, June, July and August, 1920, is in arrear and unpaid, and the plaintiffs claim the sum of \$840.00 with lawful interest on the amounts as they became respectively due on the first day of each month above set out, together with costs of this suit.

Count No. 3.

The plaintiffs, Abe Gellman and Aaron Gellman, surviving partners of Abe Gellman, Aaron Gellman and Abraham Kaminsky, trad-

ing as Gellman and Kaminsky, sue the defendants, Oliver P. M. Brown, and Detroit Department Store, Incorporated, a corporation, for money payable by the defendants to the plaintiffs for goods sold and delivered by the plaintiffs to the defendants; and for work done and materials provided by the plaintiffs for the defendants at their request; and for money lent by the plaintiffs to the defendants; and for money paid by the plaintiffs for the defendants at their request; and for money received by the defendants for the use of the plaintiffs; and for money found to be due from the defendants to the plaintiffs on account stated between them. And the plaintiffs claim the sum of \$1,260.00 with interest on amounts as follows: On \$60.00 from December 1st, 1918; on \$60.00 from January 1st, 1919; on \$60.00 from February 1st, 1919; on \$60.00 from March 1st, 1919; on \$60.00 from April 1st, 1919; on \$60.00 from May 1st, 1919; on \$60.00 from June 1st, 1919; on \$60.00 from July 1st, 1919; on \$60.00 from August 1st, 1919; on \$60.00 from September 1st, 1919; on \$60.00 from October 1st, 1919; on \$60.00 from November 1st, 1919; on \$60.00 from December 1st, 1919; on \$60.00 from 4 January 1st, 1920; on \$60 from February 1st, 1920; on \$60.00 from March 1st, 1920; on \$60.00 from April 1st, 1920; on \$60.00 from May 1st, 1920; on \$60.00 from June 1st, 1920; on \$60.00 from July 1st, 1920; on \$60.00 from August 1st, 1920, besides the costs of this suit.

SAMUEL H. GELLMAN,
JOSEPH D. SULLIVAN,
JAMES A. DAVIS,

Attorneys for Plaintiffs.

Affidavit of Merit.

* * * * *

STATE OF VIRGINIA,

City of Petersburg, ss:

I, Abe Gellman, being first duly sworn on oath depose and say that I am one of the plaintiffs mentioned in the declaration and particulars of demand hereto annexed and prayed to be read and considered as part hereof, wherein Abe Gellman and Aaron Gellman, surviving partners of Abe Gellman, Aaron Gellman and Abraham Kaminsky, trading as Gellman and Kaminsky, are named as plaintiffs therein, and Oliver P. M. Brown, and Detroit Department Store, Incorporated, a corporation, are named as defendants; that I have personal knowledge of the facts upon which the plaintiffs' cause of action against defendants in said declaration and particulars of demand as aforesaid is based, and that I make this affidavit for and on behalf of said plaintiffs; that said plaintiffs have a good cause of action and just claim against defendants as aforesaid, which 5 said cause of action is as follows, to wit:

That the said defendants by their lease agreement dated June 1st, 1918, copy of which is marked Exhibit "A" attached hereto and made a part hereof, leased from the plaintiffs herein cer-

tain property located in Hopewell, Virginia, and more particularly described in said lease agreement, for a period of three years from the 1st day of June, 1918, at a rental for said term of \$2,160.00, payable in monthly installments of \$60.00 each in advance; that on or about January 29th, 1919, the plaintiffs in response to a request for a reduction of the rent of said premises advised the defendants of their willingness to grant a reduction of rent from \$60.00 to \$-0.00 per month until such time as conditions should improve at Hopewell, Virginia; that said defendants have paid the rent up to and including the month of November, 1918; that said defendants have not, nor has anyone on their behalf, paid the said rental for the month of December, 1918, or for any month subsequent thereto; that defendants were put in possession of said premises June 1st, 1918, and retained possession until on or about February 1st, 1919, when they moved out; that there is now justly due and owing to the plaintiffs from the defendants the sum of \$1,260.00 for rent in arrears from December 1st, 1918, to August 31st, 1920, both inclusive. And the plaintiffs claim the sum of \$1,260.00 with lawful interest on the following amounts, to wit: On \$60.00 from December 1st, 1918; on \$60.00 from January 1st, 1919; on \$60.00 from February 1st, 1919; on \$60.00 from March 1st, 1919; on \$60.00 from April 1st, 1919; on \$60.00 from May 1st, 1919; on \$60.00 from June 1st, 1919; on \$60.00 from July 1st, 1919; on \$60.00 from August 1st, 1919; 6 on \$60.00 from September 1st, 1919; on \$60.00 from October 1st, 1919; on \$60.00 from November 1st, 1919; on \$60.00 from December 1st, 1919; on \$60.00 from January 1st, 1920; on \$60.00 from February 1st, 1920; on \$60.00 from March 1st, 1920; on \$60.00 from April 1st, 1920; on \$60.00 from May 1st, 1920; on \$60.00 from June 1st, 1920; on \$60.00 from July 1st, 1920; on \$60.00 from August 1st, 1920, exclusive of all set-offs and just grounds of defense, besides the costs of this suit.

ABE GELLMAN.

Subscribed and sworn to before me this 16 day of Sept., 1920.

[SEAL.]

DAVID A. LYON, JR.

EXHIBIT "A."

This deed or lease made this 1st day of June, 1918, by and between Gellman & Kaminsky, partners, parties of the first part, and Detroit Department Store, Inc., and O. P. M. Brown, parties of the second part:

Witnesseth:

That, in consideration of the sum of Sixty (\$60.00) Dollars cash in hand paid, and of the mutual undertakings of the parties hereto, the said parties of the first part do hereby demise unto the said parties of the second part all that certain lot and parcel of land, fronting twenty-five (25') feet on Poythress Avenue in the West City Point Sub-division, in the County of Prince George, Virginia, and 7 running back between parallel lines one hundred and ten (110') feet, and known as lot #19 in block #2 of the said

West City Point Sub-division, for the period of three (3) years from the first day of June, 1918 to the first day of June, 1921, yielding therefor during the said term the rent of twenty-one hundred and sixty dollars (\$2,160.00), payable in monthly installments on the first of each and every month in advance of sixty (\$60.00) dollars each.

The said lessors covenant for the lessee quiet enjoyment of this term.

The said lessees covenant to pay the said rent when the same shall be due as aforesaid, it being understood and agreed that the said Sixty (\$60) dollars cash in hand paid as above set out, shall be credited as in full of the rent due for the month of June, 1918; that they will not assign or sub-let the said premises, or any part thereof, without the written consent of the said lessors; that they shall make all repairs, that they will leave the said premises at the termination of this lease in good repair, natural tear and wear excepted.

It is further covenanted and agreed by and between the parties hereto that in the event the premises are destroyed by fire or damaged by fire to such an extent as to be untenable, then and in that event no further rental shall be due and payable by the tenant to the landlord until such premises shall be repaired, rebuilt and restored by the landlord.

And the said lessees further covenant that the said lessors may re-enter for the breach of any covenant herein contained, especially for or on account of non-payment of rent, actual demand therefor by the lessors being hereby expressly waived. The lessees hereby expressly waive the service of notice of intention to re-enter or instituting the legal proceeding to that end.

Witness the following signatures and seals:

(Signed) O. P. M. BROWN. [SEAL.]
DETROIT DEPARTMENT STORE,
INC.,

(Signed) By O. P. M. BROWN,
President.

Attest:

(Signed) GEORGIE K. BROWN,
Secretary.

— — —

[SEAL.]

Pleas of Defendants.

Filed December 8, 1920.

* * * * *

Now come the defendants, Oliver P. M. Brown, and Detroit Department Store, Inc., a corporation, and for pleas to the declaration herein filed, and to each count thereof say:

1. That they did not promise, nor did either of them, in manner and form as in said declaration alleged.

2. That they are not indebted, nor are either of them, in manner and form, as in said declaration alleged.

3. That no action can be brought or maintained by the lessors or plaintiffs, or either or any of them, for breach of said alleged lease agreement, because the same was not made in writing, signed and executed by the alleged lessors as required by the law of the State of Virginia in such cases made and provided.

HOWARD BOYD,
Attorney for Defendants.

Affidavit of Defense.

* * * * *
DISTRICT OF COLUMBIA, *To wit:*

Oliver P. M. Brown being first duly sworn deposes and says, that he is one of the defendants named in the above suit, and an officer of the other defendant therein named, and makes this affidavit on behalf of both of said defendants. That the plaintiffs are not entitled to judgment in this suit because said alleged lease, shown by the copy attached to the declaration herein, did not convey any title or interest to defendants, or either of them, in or to the land and property therein described, which was the consideration for the alleged promise to pay, upon which this suit is based, because the same was not reduced to writing, signed and executed in the manner required by the law of the State of Virginia in such cases made and provided, and the plaintiffs herein have no right to maintain this suit in its present form and said alleged contract fails as such for want of mutuality; and further, defendants, nor neither of them, have had possession or control, or have exercised any dominion whatever over said property in any manner since about February 1, 1919, but the alleged lessors, plaintiffs, or persons claiming under, through, or from them, have had the control and right to use and possess same, and presumably have exercised such rights, and therefore, there is no consideration to support plaintiffs' claim against defendants, or either of them, as set forth in this suit.

OLIVER P. M. BROWN.

Subscribed and sworn to before me this 7th day of December, 1920.

[SEAL.]

JOHN M. KING,
Notary Public, D. C.

Memorandum.

January 4, 1921.—Motion for judgment under 73rd Rule, filed.

Opinion of Court.

Filed February 21, 1921.

* * * * *
The motion for judgment is overruled with leave to file within five days a substituted or amended affidavit of merits alleging if it be the fact that the plaintiffs executed and delivered to the defendants a lease of the premises in question and generally how the transaction

was consummated. The affidavit filed is not clear as to those matters and under the decisions of the Court of Appeals should be. A copy of the amended affidavit should be served on the defendants who may file an amended affidavit of defense.

WALTER I. McCOY,
Chief Justice.

11 Supreme Court of the District of Columbia.

Monday, February 21, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * *

Upon consideration of the motion of plaintiffs filed herein for judgment against defendants under Rule 73, it is ordered that said motion be, and it is hereby overruled, with leave to plaintiffs to file within five (5) days hereof a substituted or amended affidavit of merit, and leave to defendant to file a substituted affidavit of defense within five (5) days after filing and giving notice of said substituted or amended affidavit of merit.

Amended Affidavit of Merit.

Filed February 24, 1921.

* * * * *

STATE OF VIRGINIA,

City of Petersburg, ss:

I, Abe Gellman, being first duly sworn on oath depose and say: That I am one of the plaintiffs mentioned in the declaration filed in the above entitled cause, wherein Abe Gellman, and Aaron Gellman, surviving partners of Abe Gellman, Aaron Gellman, and Abraham Kaminsky, trading as Gellman & Kaminsky, are plaintiffs and Oliver P. M. Brown and the Detroit Department Store, Incorporated, a corporation, are defendants, and that I have personal knowledge of the facts upon which the plaintiffs' cause of action against said defendants is based, and I make this affidavit on and for the behalf of the plaintiffs: That the said plaintiffs have a good cause of
12 action and a just claim against the defendants, and each of them, which cause of action is as follows, to wit: That on or about the first day of June, 1918, the plaintiffs leased to the defendants Oliver P. M. Brown and the Detroit Department Store, Incorporated, by lease dated the first day of June, 1918, a copy of which is marked Exhibit "A" and filed in the above entitled cause and is hereby specifically referred to and prayed to be made part of this affidavit, a certain property located in Hopewell, Virginia, and more particularly described in said lease, for a period of three (3) years, from the first of June 1918, at a rental of said term of \$2,160.00 payable in monthly installments of \$60.00 each in advance; and the

said Oliver P. M. Brown and the Detroit Department Store, incorporated, leased the said premises from the said plaintiffs by the said lease agreement aforesaid, and bound themselves by covenants to pay the rent as aforesaid, as the same became due; that two copies of the said lease were made and both forwarded to the defendants Oliver P. M. Brown and the Detroit Department Store, incorporated, who were located in Washington, D. C., for their execution, and both copies were returned signed and sealed by the said Oliver P. M. Brown and the Detroit Department Store, incorporated, to the plaintiffs, who were located at Richmond, Virginia, and thereupon the said plaintiffs signed and sealed one of the copies of said lease so executed by the defendants and returned the same to the said defendants on or about the 6th day of August, 1918, and retained the other copy which has been referred to as Exhibit "A" and which is

13 in all respects identical with the copy held by the said Oliver P. M. Brown and the Detroit Department Store, incorporated, except that the plaintiffs held same without having signed or sealed it, and thereupon the said Oliver P. M. Brown and the Detroit Department Store, incorporated, pursuant to the lease signed by the plaintiffs, and pursuant to the covenants contained therein on behalf of the plaintiffs and on behalf of himself and the Detroit Department Store, incorporated, entered into possession of said premises, and held the same as tenants of the said plaintiffs under the lease as aforesaid; that on or about the 29th day of January, 1919, the plaintiffs in response to a request made by the said Oliver P. M. Brown for a reduction of the rent, of said premises, advised the defendants of their willingness to grant a reduction of the rent from \$60.00 to \$40.00 per month until such time as conditions should improve at Hopewell, Virginia; that said defendants had paid rent up to and including the month of November, 1918; that the said defendants have not, nor has anyone on their behalf paid said rent for the month of December, 1918, or for any month subsequent thereto, or any part thereof; that there is justly due and owing to the plaintiffs from the defendants, the sum of \$800.00 for rent in arrears of the said premises, from the first of December 1918 to the 31st day of August, 1920, both inclusive, with lawful interest thereon from the days on which same became due as set out in declaration filed in this cause, exclusive of all set-offs and just grounds of defense.

ABE GELLMAN.

14 Subscribed and sworn to before me this 22nd day of February, A. D. 1921.

[SEAL.]

ESTHER LEVITT,
Notary Public.

My term expires Aug. 19, 1923.

Motion to Strike from Files.

Filed March 2, 1921.

* * * * *

Now come the defendants, Oliver P. M. Brown and Detroit Department Store, Inc., and move the Court to strike from the files, the paper writing called an "Amended Affidavit of Merit," filed herein by the plaintiff on, to wit, February 24, 1921, for the reason that there is no authority in law or under the rules of this court, permitting plaintiff to file an amended or substituted affidavit of merit under the 73rd rule of this Court.

HOWARD BOYD,
Attorney for Defendants.

Mr. Joseph D. Sullivan,
Attorney for Plaintiffs,
McGill Building,
Washington, D. C.:

Please take notice that the foregoing motion has been filed and calendared for hearing on the next regular motion day.

_____,
Attorney for Defendants.

15

Memorandum.

March 11, 1921.—Motion for judgment under Rule 73, filed.

Supreme Court of the District of Columbia.

Friday, March 18, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * *

Upon consideration of the motion of defendant filed herein, to strike out the amended affidavit of merit of plaintiff filed February 24, 1921, it is ordered that said motion be, and it is hereby overruled, with leave to defendant to file instantaner an affidavit of defense.

Further, the motion of plaintiff filed herein for judgment under the 73d Rule is hereby continued.

Affidavit of Defense.

Filed March 18, 1921.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

Oliver P. M. Brown, being first duly sworn, deposes and says that he is one of the defendants named in the above suit, and an officer of the other defendant, and makes this affidavit on behalf of

both. That the plaintiffs are not entitled to recover what they seek in this suit, because the defendants did not take possession of said property under or pursuant to the alleged lease upon which this suit is based, as claimed by plaintiffs, but on the contrary, prior to the time that said alleged lease is claimed to have been made, defendants bought the rights of other lessees in and to the land involved, and subsequently erected a building thereon and paid the rent therefor at "The Petersburg Loan Office, conducted by the plaintiff, Abe Gellman, in Petersburg, Va. As the end of that lease was approaching, defendants negotiated with said Abe Gellman for another lease, and there was sent to defendants from said loan office in Petersburg, two unexecuted copies of a proposed lease, both of which were returned by defendants to the said loan office, and one copy was thereafter mailed to defendants from said office, but it was not "signed and sealed" by the plaintiffs as alleged, but on the contrary it only bore the following, "Gellman and Kaminsky by Abe Gellman (Seal)", all of which was in the hand of said Abe Gellman except the word "seal" and brackets about it, which were placed thereon by a typewriting machine. No other signature or seals appeared thereon, nor did the name of Abe Gellman appear anywhere else in or on said instrument, nor did any authority from any person for the execution thereof, in or on said paper writing. Said instrument is the only one purporting to be a lease of said property by any of said plaintiffs, received by defendants or either of them, and neither of defendants ever sent any lease or proposed lease to the plaintiffs at Richmond, Va., or received from them from Richmond a copy of any lease signed or sealed by plaintiffs or any of them, as alleged. Defendants did not take possession of said property under the lease alleged by plaintiffs, but on the contrary they took possession under a prior lease which they bought, as aforesaid, and they continued to pay rent after the expiration thereof, at said loan office of Abe Gellman, at Petersburg, Va., as they had done prior thereto. Defendants never had any dealings whatever with Abraham Kaminsky, personal-, and the name of Aaron Gellman did not appear anywhere in or on said instrument, and neither of defendants ever knew or heard of him until this suit was filed, and consequently never knew that he claimed to be a party to any contract or agreement with defendants, or that he claimed to be a partner in the firm of Gellman and Kaminsky. The record thus fails to show the existence of such a legal lease as is described in the declaration, and affidavits of plaintiffs, and such as would convey any interest in the land in question to the defendants under the law of the State of Virginia, and therefore it shows no mutuality, consideration for plaintiffs' claim, or right in plaintiffs to recover what is claimed. Further, aside from the suit being improper in form, the defendants have not had or exercised any possession or control of or over said property since about February 1, 1919, at which time they and each of them vacated and abandoned the same, but alleged lessors, plaintiffs or persons claiming under or through them, or some of them, have had the right and privilege to possess, control

and use the same continuously, and have presumably exercised such right and privilege, and affiant is informed and believes, and expects to prove at the trial, that the plaintiffs or someone claiming under them, or some of them took possession of said property after it was vacated and abandoned by defendants, as aforesaid, and offered to rent the same, but no credit is given to defendants in this suit by reason thereof, nor is any explanation given in either
 18 the first or amended affidavit of plaintiffs of their failure to give such credit.

OLIVER P. M. BROWN.

Subscribed and sworn to before me this 16th day of March, 1921.

E. P. WHEATLEY, [SEAL.]
 Notary Public, D. C.

Opinion of the Court.

Filed April 25, 1921.

* * * * *

The contract was made in Virginia and relates to land there so it must be interpreted according to the law of that State.

It is the law in Virginia that a partner cannot be held liable on a deed executed by his co-partner unless he has given authority under seal to the latter, or was present when it was executed or unless he ratified the act by writing under seal. *Gordon vs. Funkhouser*, 100 Va. 675. The court there notes that there has been a strong disposition in a number of American cases to contest the doctrine "that it requires a prior authority or a subsequent ratification under seal to make the execution of a sealed instrument by one partner *valid and binding upon* the other partner * * * "

(Italics supplied.) In commenting on *Hare & Wallace's* note to the case of *Livingston vs. Roosevelt*, 1 Amer. L. Cas. 544-545 the court seems to indicate that its decision is in principle limited to
 19 cases in which the partner not signing is defendant. The note of *Hare & Wallace* is not explicit on the point but seems to limit the doctrine in the same way.

In *Anderson vs. Tompkins*, 1 Fed. Cas. No. 365, 1 Amer. L. Cas. 429, Chief Justice Marshall sitting as Circuit Judge for the District of Virginia referring to *Harrison vs. Jackson*, 7 Durn. & E. (Term R.) 207, said that the decision therein that one partner had no authority to bind another by deed had not been questioned in England or in this country but added:

"I am not, and never have been, satisfied with the extent to which this doctrine has been carried. The particular point decided in it, is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. That was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to

the decision. No action can be sustained against the partner, who has not executed the instrument, on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled * * *

No case has been found in States where the strict rule of ratification applies holding directly upon facts similar to those in the present case that an action will lie on an instrument under seal when the seal is that of the agent and the principle sues but surely that ought to be the law and especially where besides bringing an action the principal has received payment of amounts which the other party to the agreement promised therein to pay. See *Donason vs. Barbero*, 230 Ill. 138 at 151. If it be claimed that there is no mutuality if one party is not bound until he acts on the strength of the agreement the answer is that such a contention if sustained would prevent even a ratification under seal.

The conclusion is that the plaintiffs may recover upon the lease as upon a sealed instrument unless the absence of a seal opposite the name of the corporation defendant on the lease prevents its being considered as a sealed instrument.

The seal opposite the name of the individual defendant is also that of the corporation defendant. *District of Columbia vs. Camden Iron Works*, 181 U. S. 453; *Rockwell vs. Capital Traction Co.*, 25 App. D. C. 98; *Rusling vs. Union Pipe Co.*, 5 App. Div. 448, affirmed, 158 N. Y. 737.

When a lessee already in possession takes and holds under a new lease he enters into possession under that lease.

The defendants do not deny that they paid rent under the lease in question but state merely that they continued to pay rent at a certain place.

The affidavit of the plaintiffs states that the instrument in question was sealed by the plaintiffs. If the view taken above is correct the allegation is true and is met in the affidavit of defense only by statements of what the defendants claim to be the effect as matter of law of the signing and sealing by only one partner.

The motion for judgment is granted.

WALTER I. MCCOY,
Chief Justice.

21 Supreme Court of the District of Columbia.

Monday, April 25, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * *

Upon consideration of the motion of plaintiffs filed herein for judgment against defendants under Rule 73 of this Court, it is ordered that said motion be, and it is hereby granted.

Wherefore it is considered that plaintiffs herein recover of defendants the sum of Twelve hundred and sixty dollars (\$1,260.00),

with interest on sixty dollars (\$60) thereof from December 1, 1918; on sixty dollars (\$60) from January 1, 1919; on sixty dollars (\$60) from February 1, 1919; on sixty dollars (\$60) from March 1, 1919; on sixty dollars (\$60) from April 1, 1919; on sixty dollars (\$60) from May 1, 1919; on sixty dollars (\$60) from June 1, 1919; on sixty dollars (\$60) from July 1, 1919; on sixty dollars (\$60) from August 1, 1919; on sixty dollars (\$60) from September 1, 1919; on sixty dollars (\$60) from October 1, 1919; on sixty dollars (\$60) from November 1, 1919; on sixty dollars (\$60) from December 1, 1919; on sixty dollars (\$60) from January 1, 1920; on sixty dollars (\$60) from February 1, 1920; on sixty dollars (\$60) from March 1, 1920; on sixty dollars (\$60) from April 1, 1920; on sixty dollars (\$60) from May 1, 1920; on sixty dollars (\$60) from June 1, 1920; on sixty dollars (\$60) from July 1, 1920; and on sixty dollars (\$60) from August 1, 1920, being the money payable by said defendants to plaintiffs by reason of the premises, together with the
22 costs of suit, to be taxed by the Clerk and have execution thereof.

Memorandum.

May 6, 1921.—Order for appeal and citation; and fixing undertaking for costs on appeal at \$100 or \$50 deposit, filed.

23 In the Supreme Court of the District of Columbia.

At Law.

No. 64313.

ABE GELLMAN and AARON GELLMAN, Surviving Partners of Abe Gellman, Aaron Gellman, and Abraham Kaminsky, Trading as Gellman and Kaminsky,

v.

OLIVER P. M. BROWN and DETROIT DEPARTMENT STORE, INC., a Corporation.

The President of the United States to Abe Gellman and Aaron Gellman, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the Supreme Court of the District of Columbia, on the 6th day of May, 1921, wherein Oliver P. M. Brown and Detroit Department Store, Inc., a corporation, are Appellants, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the

Supreme Court of the District of Columbia, this 6 day of May in the year of our Lord one thousand nine hundred and twenty-one.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

By CHAS. B. COFLIN,
Asst. Clerk.

Service of the above Citation accepted this 10 day of May, 1921.

JOSEPH D. SULLIVAN,
Attorney for Appellee.

J.

[Endorsed:] No. 64313. Law. Equity. Gellman vs. Brown. Citation. Issued May 6, 1921. Howard Boyd, Attorney for Appellant.

24

Memorandum.

May 17, 1921.—Bond on appeal, filed.

Assignments of Error.

Filed May 19, 1921.

* * * * *

The Honorable Trial Judge erred as follows: .

1. In holding defendants liable, though there was no consideration or mutuality, and no performance of the condition precedent.

2. In ruling that the law presumed a partnership between the plaintiffs, Abe Gellman and Aaron Gellman, because they were the survivors of the partnership firm of Abe Gellman, Aaron Gellman and Abraham Kaminsky.

3. In holding that a lease of real property made by Abe Gellman and signed by him "Gellman and Kaminsky, by Abe Gellman (Seal)", is presumed by the law to be a partnership contract, within the scope of such partnership, and further, that it is presumed that Abe Gellman had authority to make it, even in the absence of an allegation that a partnership existed between them, or that the leased property belonged to the partnership.

4. In holding that an attempt on the part of Abe Gellman, without authority, to make a Virginia contract of lease under seal of real property, on behalf of himself and copartner, could be ratified by the latter without the use of a seal.

5. By granting judgment against defendants under the 73rd rule of the Supreme Court of the District of Columbia,
25 based upon facts stated only in defendants' affidavit of defense.

6. In granting judgment in an action of assumpsit for rent under a sealed lease.

7. In giving judgment against both defendants in an action of

assumpsit for rent claimed under a lease which was sealed by one defendant, but not by the other.

8. In permitting the plaintiffs to amend their affidavit filed pursuant to the 73rd rule of the Supreme Court of the District of Columbia.

HOWARD BOYD,
Atty. for Defendants.

Designation of Record.

Filed May 20, 1921.

* * * * *

The Clerk of the Supreme Court of the District of Columbia will please prepare a transcript of the record of the above cause for appeal to the Court of Appeals of the District of Columbia, consisting of the following:

1. The declaration, exhibit and affidavit attached thereto, filed by the plaintiffs.
2. The pleas and affidavit of defense filed by the defendants.
3. Memo of motion for judgment filed by plaintiffs.
4. Opinion of Court denying motion and granting leave to plaintiffs to amend.
5. Judgment of Court denying motion for judgment and giving leave to plaintiffs to amend.
- 26 6. Amended affidavit of merit filed by the plaintiffs.
7. Motion by defendants to strike from the files plaintiffs' amended affidavit.
8. Order of Court denying defendants' motion to strike out plaintiffs' amended affidavit.
9. Order of Court permitting defendants to file additional affidavit of defense.
10. Affidavit of defense filed by defendant.
11. Memo of plaintiffs' motion for judgment.
12. Opinion of Judge granting plaintiffs' motion for judgment.
13. The judgment of the Court in favor of the plaintiffs against the defendants.
14. Memo of appeal noted, citation on appeal and acceptance thereof.
15. Memo of order of Court fixing the penalty of the bond on appeal, and the filing and approval of such bond.
16. The assignments of error filed herein by the defendants, and,
17. This designation.

HOWARD BOYD,
Attorney for Defendants.

27 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 64313 at Law, wherein Abe Gellman and Aaron Gellman, surviving partners, &c. trading as Gellman and Kaminsky are Plaintiffs and Oliver P. M. Brown, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of June, 1921.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3689. Oliver P. M. Brown et al., appellants, vs. Abe Gellman et al. Court of Appeals, District of Columbia. Filed Jul. 5, 1921. Henry W. Hodges, clerk.

